FILE COPY

Office - Supreme Court, U. S
FILED
NOV 2 1937
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1937.

THOMAS J. BRADY, *Petitioner,*

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a Corporation.

No. 163.

PETITION FOR REHEARING AND RECONSIDERATION, AND BRIEF IN SUPPORT THEREOF.

MARK D. EAGLETON,
Counsel for Petitioner.

MERRITT U. HAYDEN,
ROBERTS P. ELAM,
Of Counsel.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

INDEX.

	Page
Petition for rehearing and reconsideration	1–2
Certificate of counsel	3
Supporting brief	4–10
I. The judgment of the Supreme Court of Missouri, entered on the 19th day of February, 1937, reversing outright the judgment of the Circuit Court of the City of St. Louis, Missouri, is a final judgment in Missouri	4
Argument	5
Conclusion	9

Cases Cited.

Abbott v. Kansas City Elevated R. Co., 232 Mo. 616, 135 S. W. 1199	4, 7
Berry v. Majestic Milling Co., 304 Mo. 292, 263 S. W. 406	4, 7
Donnell v. Wright, 199 Mo. 304, 97 S. W. 928	4, 7
Ginnochio v. Illinois Central R. Co., 264 Mo. 516, 175 S. W. 196	4, 7
Gipsy Oil Co. v. Escoe, 275 U. S. 498, 48 S. Ct. 112, 72 L. Ed. 393	8
Kingman v. Western Manufacturing Co., 170 U. S. 675, 18 S. Ct. 786, 42 L. Ed. 1192	8
McGrew Coal Co. v. Mellon, 315 Mo. 798, 287 S. W. 458	9
Morse v. United States, 270 U. S. 151, 46 S. Ct. 241, 70 L. Ed. 518	8
Sabol v. St. Louis Cooperage Co. (Mo. Sup.), 31 S. W. (2d) 1041	4, 7

State ex rel. McGrew Coal Co. v. Ragland (Mo. Sup.), 97 S. W. (2d) 113 9
Strottman v. St. Louis, I. M. & S. R. Co., 228 Mo. 154, 128 S. W. 187, 30 L. R. A. (N. S.) 377 ..... 4, 7
Walsh Construction Co. v. United States Guarantee Co. (C. C. A. 8), 76 Fed. (2d) 240 ..... 4, 8

Statutes Cited.

Revised Statutes of Missouri, 1929:
Sec. 1063 ..... 4, 5
Sec. 1065 ..... 4, 5

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1937.

THOMAS J. BRADY, *Petitioner,* vs. TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a Corporation.		No. 163.

PETITION FOR REHEARING AND RECONSIDERATION.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now Thomas J. Brady, petitioner in the above-entitled cause, and petitions this Honorable Court for a rehearing of his petition for a writ of certiorari herein filed, and a reconsideration of this Honorable Court's order herein under date of October 11, 1937, denying petitioner a writ of certiorari upon the ground that it does not appear from the record that there is a final judgment, and for grounds for this petition, petitioner states:

I.

That the judgment of the Supreme Court of Missouri entered upon the 19th day of February, 1937, and which

petitioner seeks to have reviewed by writ of certiorari, is set out verbatim on pages 173 and 174 of the printed transcript of record filed in this court by petitioner with his petition for a writ of certiorari on the 22nd day of June, 1937.

II.

That said judgment of the Supreme Court of Missouri, reversing outright the judgment of the Circuit Court of the City of St. Louis, Missouri, is a final judgment.

III.

That this Honorable Court, through inadvertence, mistake or oversight, denied petitioner's petition for a writ of certiorari upon the ground that "it does not appear from the record that there is a final judgment."

Your petitioner most respectfully submits herewith his brief in support hereof.

THOMAS J. BRADY, *Petitioner,*

By MARK D. EAGLETON,
Counsel for Petitioner.

MERRITT U. HAYDEN,
ROBERTS P. ELAM,
Of Counsel.

Certificate of Counsel.

Mark D. Eagleton, counsel for petitioner in the above-entitled cause, hereby certifies that the above and foregoing petition for rehearing and reconsideration is presented in good faith and not for delay.

Dated at St. Louis, Missouri, this 1st day of November, 1937.

MARK D. EAGLETON,
Counsel for Petitioner.

SUPPORTING BRIEF.

I.

The judgment of the Supreme Court of Missouri, entered on the 19th day of February, 1937, reversing outright the judgment of the Circuit Court of the City of St. Louis, Missouri, is a final judgment in Missouri.

Sections 1063 and 1065, Revised Statutes of Missouri 1929;

Donnell v. Wright, 199 Mo. 304, 97 S. W. 928;

Ginnochio v. Illinois Central R. Co., 264 Mo. 516, 175 S. W. 196;

Abbott v. Kansas City Elevated R. Co., 232 Mo. 616, 135 S. W. 1199;

Berry v. Majestic Milling Co., 304 Mo. 292, 263 S. W. 406;

Strottman v. St. Louis, I. M. & S. R. Co., 228 Mo. 154, 128 S. W. 187, 30 L. R. A. (N. S.) 377;

Walsh Construction Co. v. United States Guarantee Co. (C. C. A. 8), 76 Fed. (2d) 240;

Sabol v. St. Louis Cooperage Co. (Mo. Sup.), 31 S. W. (2d) 1041.

ARGUMENT.

This Honorable Court, on the 11th day of October, 1937, denied petitioner's petition for writ of certiorari upon the ground that "it does not appear from the record that there is a final judgment." Petitioner most respectfully submits that such order was made by this Honorable Court through inadvertence, mistake or oversight, as the judgment of the Supreme Court of Missouri entered upon the 19th day of February, 1937, and which petitioner seeks to have reviewed by writ of certiorari, appears verbatim on pages 173 and 174 of the printed transcript of record filed in this court by petitioner with his petition for a writ of certiorari on the 22nd day of June, 1937, and is a final judgment in Missouri, if not elsewhere.

Section 1063 of the Revised Statutes of Missouri 1929, so far as it is applicable, reads as follows:

> "The supreme court, St. Louis court of appeals and Kansas City court of appeals, in appeals or writs of error, shall examine the record and award a new trial, reverse or affirm the judgment or decision of the circuit court, or give such judgment as such court ought to have given, as to them shall seem agreeable to law; * * *."

Section 1065 of the Revised Statutes of Missouri 1929 provides as follows:

> "The supreme court, upon the determination of any cause in appeal or error, may award execution to carry the same into effect, or may remit the record, with their decision thereon, to the court from whence the cause came, and such determination shall be carried into execution by such court."

The judgment of the Supreme Court sought to be reviewed by petitioner's petition for a writ of certiorari appears on pages 173 and 174 of the printed transcript of record in this cause as follows (caption omitted):

> "Now at this day come again the parties, aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of St. Louis City rendered, be reversed, annulled and for naught held and esteemed, and that the said appellant be restored to all things which it has lost by reason of the said judgment; and that the said appellant recover against the said respondent its costs and charges herein expended, and have execution therefor. (Opinion filed.)"

In the Court's opinion, which immediately thereafter follows in the printed transcript of record, at pages 174 to 183 thereof, inclusive, it is distinctly shown that the merits of the cause were passed upon by the Supreme Court of Missouri, that Court holding that, under the facts involved, the defendant was under neither statutory nor common-law liability to the plaintiff.

In the light of the foregoing, it becomes manifest that said judgment of the Supreme Court of Missouri is final in that it reversed the judgment and decision of the Missouri circuit (trial) court, gave such judgment as seemed to the Supreme Court of Missouri to be agreeable to law, awarded restitution to the appellant, and *awarded execution to carry the judgment of that Court into effect.* At the same time, the said judgment of the Supreme Court of Missouri did not remit or remand the case to the trial court for further proceedings to carry the judgment of the Supreme Court of Missouri into execution, such re-

mission or remand being optional under Section 1065 of the Revised Statutes of Missouri 1929, and *the trial court was thereby deprived of all jurisdiction to further proceed in the cause.* Donnell v. Wright, 199 Mo. 304, 97 S. W. 928; Ginnochio v. Illinois Central R. Co., 264 Mo. 516, 175 S. W. 196; Abbott v. Kansas City Elevated R. Co., 232 Mo. 616, 135 S. W. 1199; Berry v. Majestic Milling Co., 304 Mo. 292, 263 S. W. 406.

In Strottman v. St. Louis, I. M. & S. R. Co., 228 Mo. 154, 186, 128 S. W. 187, 193, 30 L. R. A. (N. S.) 377, the Missouri Supreme Court en banc distinctly said:

> "By statute, we are authorized to enter judgments of simple reversal, and these judgments may or may not be finalities. **If the merits of the cases are adjudicated and passed upon they are final,** * * *. So that, considering the whole statute, we are of the opinion that a reasonable construction thereof precludes the plaintiff from again suing after a judgment of reversal in a case wherein the merits of the controversy have been investigated and adjudicated by the court, and this fact is one of easy determination."

In the more recent case of Sabol v. St. Louis Cooperage Co. (Mo. Sup.), 31 S. W. (2d) 1041, in discussing the previous decision of that same case in 313 Mo. 527, 282 S. W. 425, the Court distinctly said (31 S. W. [2d], l. c. 1044):

> "* * * All of the evidence offered in the first case was fully considered by Division 1, and it held that such evidence was not sufficient to fasten upon defendant liability for plaintiff's injury. It, therefore, reversed the judgment outright.
>
> "How the judgment of a court could more conclusively decide a case upon its merits, we are unable to

comprehend. Had Division 1 felt that plaintiff could have produced evidence to prove negligence on defendant's part, it could and doubtless would have remanded the case for a new trial, instead of reversing the judgment outright. Sykes v. Railway Co., 178 Mo. 693, loc. cit. 715, 77 S. W. 723; Rutledge v. Railroad Co., 123 Mo. 121, loc. cit. 140, 24 S. W. 1053, 27 S. W. 327; Strottman v. Railroad Co., 228 Mo. 154, loc. cit. 187, 128 S. W. 187, 30 L. R. A. (N. S.) 377; Finnegan v. Railroad Co., 244 Mo. 608, loc. cit. 663, 149 S. W. 612. Division 1 had full power to terminate the litigation. **Its order of outright reversal resulted in such termination. That judgment is conclusive and binding, not only upon the trial court, but upon the Supreme Court in division and en banc.''**

Likewise, in Walsh Construction Co. v. United States Guarantee Co. (C. C. A. 8), 76 Fed. (2d) 240, 242, it was distinctly said:

> "It will be found quite uniformly to be the rule that, when an appellate court, finding under the law that no recovery can be had, uses the word 'reversed' without more, this means that the case is at an end.''

If the judgment of the Supreme Court of Missouri reversing the case outright (R. 173-74) resulted in a termination of the litigation and means that the case is at an end, how can such judgment be anything other than a final judgment?

Even though it may be said that under the decisions in Kingman v. Western Manufacturing Co., 170 U. S. 675, 18 S. Ct. 786, 42 L. Ed. 1192; Morse v. United States, 270 U. S. 151, 46 S. Ct. 241, 70 L. Ed. 518, and Gipsy Oil Co. v. Escoe, 275 U. S. 498, 48 S. Ct. 112, 72 L. Ed. 393, *for the purpose of appeal or error,* the judgment of the Su-

preme Court of Missouri entered on the 19th day of February, 1937, did not become final until the motion for rehearing, and motion to modify opinion, filed in that court on March 1st, 1937 (R. 184), were overruled by that court on March 24th, 1937 (R. 191), such judgment of the Supreme Court of Missouri became final *for all purposes* on the 24th day of March, 1937, long prior to the filing of this petitioner's petition for a writ of certiorari which was filed in this court on June 22nd, 1937.

The form of the judgment entered in the Supreme Court of Missouri on February 19th, 1937 (R. 173-174), is practically identical with the form of the judgment entered by that same court in the case of McGrew Coal Co. v. Mellon, 315 Mo. 798, 287 S. W. 458, and this Honorable Court entertained a petition for certiorari to review the judgment in the Mellon case, evidently considering it to be a final judgment, although it did deny the writ of certiorari in 273 U. S. 752, 47 S. Ct. 456, 71 L. Ed. 874. In this connection, see State ex rel. McGrew Coal Co. v. Ragland (Mo. Sup.), 97 S. W. (2d) 113, which discusses this situation at some length.

By reason of the foregoing, petitioner most respectfully submits that the order of this Honorable Court entered on October 11, 1937, denying petitioner's petition for a writ of certiorari upon the ground that "it does not appear from the record that there is a final judgment," was entered by this Honorable Court by reason of a misapprehension, mistake, or oversight, the record having fully disclosed the existence of a final judgment. Accordingly, petitioner

most respectfully submits that his petition for rehearing and reconsideration be sustained.

Respectfully submitted,

MARK D. EAGLETON,
Counsel for Petitioner.

MERRITT U. HAYDEN,
ROBERTS P. ELAM,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 163.—October Term, 1937.

Thomas J. Brady, Petitioner,
vs.
Terminal Railroad Association of St. Louis.

On Writ of Certiorari to the Supreme Court of the State of Missouri.

[January 31, 1938.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The Supreme Court of Missouri reversed a judgment which petitioner had recovered under the Federal Safety Appliance Act (102 S. W. (2d) 903) and rendered a final judgment in favor of respondent. (See *State* v. *Ragland*, 339 Mo. 452, 456, 458.) In view of the importance of the question in the administration of the federal statute, this Court granted certiorari, — U. S. —.

Petitioner was employed by the Wabash Railway Company as a car inspector in its yard at Granite City, Illinois. He was injured in November, 1927, while inspecting a car which was one of a string of cars brought by the respondent, Terminal Railroad Association of St. Louis, from St. Louis to Granite City and placed upon a track of the Wabash known as a "receiving" or "inbound" track. The purpose of the inspection was to determine whether the cars were to be accepted by the Wabash. Both the Wabash and the Terminal companies were carriers engaged in interstate commerce.

While making his inspection petitioner stood upon one of the side ladders of the car, and, in attempting to pull himself to the top of the car, petitioner took hold of a grabiron which, with the board to which it was attached, became loose, causing him to fall. The board was found to have "become rotten from end to end on the under side, and to some extent on the upper side around the bolts by which the grabiron was attached to it".

Petitioner first sued his employer, the Wabash, under the provisions of the Federal Safety Appliance Act, but a judgment in

his favor was reversed upon the ground that the car had not yet been accepted by the Wabash Company which therefore had not hauled or used it, or permitted it to be hauled or used, within the prohibition of the statute: *Brady* v. *Wabash Railway Company*, 329 Mo. 1123. While that suit was pending, petitioner brought the present suit against respondent.

The federal statute (Act of April 14, 1910, c. 160, sec. 2, 36 Stat. 298, 45 U. S. C. 11) provides that

"it shall be unlawful for any common carrier subject to the provisions of this Act to haul, or permit to be hauled or used on its line any car subject to the provisions of this Act not equipped with appliances provided for in this Act, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure hand holds or grab irons on their roofs at the tops of such ladders:"

The Act of 1910 supplemented the provisions of the Act of March 2, 1893, c. 196, 27 Stat. 532 (45 U. S. C. 7) which provided in section 8:

"Any employee of any common carrier engaged in interstate commerce by railroad who may be injured by any locomotive, car, or train in use contrary to the provision of this chapter shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge".

See, also, Federal Employers' Liability Act, 35 Stat. 65, c. 149, sec. 4 (45 U. S. C. 54).

The first question is whether the car can be said to have been in use by the respondent at the time in question. The statute gives no ground for holding that it was the intent of Congress that in a situation such as is here presented neither the Wabash nor the Terminal Association should be subject to the statutory duty. The "use, movement or hauling of the defective car", within the meaning of the statute, had not ended when petitioner sustained his injuries. *Chicago Great Western R. Co.* v. *Schendel*, 267 U. S. 287, 291, 292. The car had been brought into the yard at Granite City and placed on a receiving track temporarily pending the continuance of transportation. If not found to be defective, it would proceed to destination; if found defective, it would be subject to

removal for repairs. It is not a case where a defective car has reached a place of repair. See *Baltimore & Ohio R. Co.* v. *Hooven*, 297 Fed. 919, 921, 923; *New York, C. & St. L. R. Co.* v. *Kelly*, 70 F. (2d) 548, 551. The car in this instance had not been withdrawn from use. *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, 21, 22; *Delk* v. *St. Louis & San Francisco R. Co.*, 220 U. S. 580, 584-586; *Great Northern Railway Co.* v. *Otos*, 239 U. S. 349, 351; *Chicago Great Western R. Co.* v. *Schendel, supra.* The car was still in use, though motionless. *Minneapolis, St. Paul & Sault Ste. Marie Rwy. Co.* v. *Goneau*, 269 U. S. 409. In view of that use, either the Terminal Association or the Wabash was subject to the obligation imposed by the statute.

The question then is whether the responsibility of the Terminal Association, which brought in the car, had ended. We think that question is answered by the undisputed fact that it was placed by the Terminal Association on the receiving track to await inspection and acceptance by the Wabash.

The Wabash had not accepted it. The jury, which found for petitioner, were instructed that as a condition of that verdict it was necessary for them to find that petitioner "was required to go upon said car for the purpose of inspecting the equipment thereon and of accepting or rejecting said car on behalf of his employer, the Wabash Railway Company". We cannot agree with the view, expressed in the opinion of the state court in reversing the judgment, that "granted that the cars were still (in the legal sense) in the possession of the Terminal", it might still be held that "the right of control" had passed to the Wabash. As the Wabash had not accepted the car, the Wabash had not assumed control and petitioner was examining the car in order to determine whether the Wabash should assume control.

As the car had not been withdrawn from use and was still in the possession of the Terminal Association, its statutory obligation continued and the question is whether that duty was owing to petitioner. The fact that petitioner was not an employee of the Terminal Association did not necessarily absolve it from duty to him. We have said that "the nature of the duty imposed by the statute and the benefits resulting from its performance" usually determine what persons are entitled to invoke its protection. It was in this view that we held that the power brakes required by the Safety

Appliance Act were not only for the safety of railway employees and passengers on trains but also of travelers on the highways at railway crossings. *Fairport R. Co.* v. *Meredith,* 292 U. S. 589, 596, 597. In the instant case, petitioner in the course of his duty would have occasion to go upon the car and use the grabiron, and accordingly the benefit of the statute would extend to him, although he was not employed by the carrier holding the car in use, unless he was outside the scope of the statute because of the special character of his work. His work was that of inspection to discover defects of the sort here found to exist as well as others.

This final question must be determined in the light of the nature of the obligation resting upon the carrier in relation to the use of a defective car. The statutory liability is not based upon the carrier's negligence. The duty imposed is an absolute one and the carrier is not excused by any showing of care however assiduous. *St. Louis & Iron Mountain Rwy. Co.* v. *Taylor,* 210 U. S. 281, 295; *Chicago, Burlington & Quincy Rwy. Co.* v. *United States,* 220 U. S. 559, 570; *Louisville & Nashville R. Co.* v. *Layton,* 243 U. S. 617, 620, 621; *Great Northern Railway Co.* v. *Otos, supra.* The breadth of the statutory requirements is shown by the fact that it embraces all locomotives, cars and similar vehicles used on any railway that is a highway of interstate commerce and is not confined exclusively to vehicles engaged in such commerce. *Southern Railway Company* v. *United States,* 222 U. S. 20. Laying down this comprehensive rule as a matter of public policy, Congress has made no exception of those employed in inspecting cars. The statute has been liberally construed "so as to give a right of recovery for every injury the proximate cause of which was a failure to comply with a requirement of the Act". *Swinson* v. *Chicago, St. P., M. & O. Rwy. Co.,* 294 U. S. 529, 531. In *Davis* v. *Wolfe,* 263 U. S. 239, 243, reviewing the earlier cases, the Court held that one can recover "if the failure to comply with the requirements of the act is a proximate cause of the accident, resulting in injury to him while in the discharge of his duty, although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection". Even where the required equipment is known to have become defective and the car is being hauled to the nearest available point for repairs, while the Act relieves the carrier in such a case from the prescribed penalties, the carrier still remains

subject by the express terms of the statute to civil liability for injuries sustained by "any railroad employee" in the course of such a movement by reason of the defective equipment. Act of April 14, 1910, c. 160, sec. 4, 36 Stat. 299 (45 U. S. C. 13). See *New York, C. & St. L. R. Co.* v. *Kelly, supra.*

We think that these considerations require the conclusion that one is not to be denied the benefit of the Act because his work was that of inspection for the purpose of discovering defects. As we said in *Louisville & Nashville R. Co.* v. *Layton, supra,* the liability "springs from its being made unlawful to use cars not equipped as required,—not from the position the employee may be in or the work which he may be doing at the moment when he is injured", provided the defective equipment is the proximate cause of the injury.

The fact that petitioner was looking for defects of the sort which caused his injury does not prevent recovery as the statute expressly excludes the defense of assumption of risk. 45 U. S. C. 7, 54.

The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Mr. Justice CARDOZO took no part in the consideration and decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.